FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Arbuckle, California)

HEXADYNE DRILLING CORPORATION 1/

Employer

and

ROBERT BURNS, AN INDIVIDUAL

Petitioner

OPERATING ENGINEERS LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Union

20-RD-2357 **DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act. 4/

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: 5/

All employees employed by the Employer engaged in drilling of oil, gas, injection wells, or service wells onshore and offshore in the States of California, Utah, Nevada, Hawaii, Territory of Guam and American Samoa occupied in the following job classifications: driller, derrickman, mechanic, motorman/catheadman, rotary helper, mechanic helper, welder, roustabout, yardman, oilfield truck driver, floorman, and floorhand helper; excluding all other employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION 6/

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained

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their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by OPERATING ENGINEERS LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before January 3, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by January 10, 2003.

Dated December 27, 2002

at San Francisco, California

/s/ Timothy W. Peck
Acting Regional Director, Region 20

1/ The Employer's name is in accord with the parties' stipulation.

2/ The parties stipulated and the record reflects that the Employer, a California corporation with an office and place of business in Arbuckle, California, is engaged in the business of performing drilling services for the oil and gas and geothermal industry. During the 12-month period ending November 30, 2002, the Employer performed drilling services valued in excess of $50,000 outside the State or California. Therefore, I find that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

4/ The Union contends that the instant petition should be dismissed on the basis that it is barred by the Board's contract bar doctrine. The Employer and the Petitioner take the contrary view. I find that there is no contract bar to the petition and I therefore decline to dismiss the petition on this basis.

The record contains a document executed by the Employer and the Union titled "Independent Oilfield Drilling Agreement" that is effective by its terms for the period February 1, 1983 to January 31, 1986. The recognition clause of this agreement states that the Employer recognizes the Union as "the sole and exclusive collective-bargaining representative of all Employees engaged in drilling of oil, gas, injection wells, or service wells onshore and offshore in the States of California, Utah, Nevada, Hawaii, Territory of Guam and American Samoa occupied in the job classifications included in Exhibit A, excluding all other employees, guards and professional employees as defined in the National Labor Relations Act." Exhibit A lists the following job classifications: driller, derrickman, mechanic, motorman/catheadman, rotary helper, mechanic helper, welder, roustabout, yardman and oilfield truck driver.

Attached to the Independent Oilfield Agreement is a document titled Memorandum of Agreement. This document, signed by the parties on October 1, 1983, refers to the Employer's development of a new "Streamlined Drilling Rig," and lists manning and wage provisions for the rig as follows:

2. Manning of the Rig will consist of the following classifications:
   - (a) one (1) Driller
   - (b) one (1) Derrickman
   - (c) one (1) Motorman
   - (d) one (1) Floorman or one (1) Rotary Helper
   - (e) one (1) Floorhand Helper (a new classification)

The record also contains a document executed by the Employer and the Union titled "Hexadyne Drilling Corporation Extension Agreement 1991 - 1992," This document is effective from February 1, 1991, to and including midnight on

January 31, 1992. It has an automatic renewal provision by which it is renewed for a one-year period each year following its expiration.

The record further contains a document titled "Hexadyne Drilling Corporation Extension Agreement 1993-1995." This document was executed by the Employer on May 25, 1995 and is effective from February 1, 1995 until midnight January 31, 1996. It also has an automatic renewal provision by which it is renewed for a one-year period each year following its expiration. The copy of the 1993-1995 Extension Agreement in the record bears only the signature of the Employer and not that of any Union representative. This document contains wage rates for the classifications of driller, derrickman, mechanic, motorman, rotary helper, mechanic helper, welder, roustabout, yardman and oil field truck driver. It also contains the following provision for the classification of toolpusher:

> Toolpusher
> Effective April 24, 1995, all Employees employed by the Employer in the classification of Toolpusher shall be covered by all terms and conditions of the 1986 Master Agreement, except Section(s) 07.00.00 WAGES, 08.00.00 HOURS OF WORK, 09.00.00 PPREMIUM PAY and 11.00.00 WORKING CONDITIONS.
> Wages. Employees in the classification of Toolpusher shall be paid a minimum salary of three thousand ($3000.00) Dollars per month.

Employer Human Resources Vice President Yvonne Zertuche has been employed by the Employer since 1990. She testified that when she began work for the Employer in 1990, Union Business Manager Dan Senechal went through the Independent Oilfield Agreement and explained its provisions to her. According to Zertuche, the 1991-1992 Extension Agreement had continued in effect through 1995 pursuant to its automatic renewal provision. In 1995, Union Business Manager Senechal asked the Employer to sign the 1993-1995 Extension Agreement in order to have a written contract to "bridge the gap," between the 1991-1992 Extension Agreement and 1995. Senechal thereafter sent a copy of the 1993-1995 Extension Agreement to the Employer to sign. The Employer executed the document and returned a signed copy to the Union but has never received copy signed by the Union. Nevertheless, the Employer has treated the 1993-1995 Extension Agreement as the operative collective-bargaining agreement with the Union and since neither party had given notice to terminate it prior to October 31, 2002, the Employer treated it as having renewed for a series of one-year periods through 2002.

At the hearing, the Union asserted that it could not locate a copy of the 1993-1995 Extension Agreement and took the position that the most recent contract in force between the parties was the 1991-1992 Extension Agreement.

Analysis. As noted above, the Union contends that the petition herein should be dismissed on the basis that there is a contract bar to this proceeding. The Employer and the Petitioner take the contrary view.

The Board has long held that in order for a contract to serve as a bar to an election petition, it must be written, signed by the parties, have a fixed term on its face, and contain substantive terms and conditions of employment deemed sufficient to stabilize a bargaining relationship. *Appalachian Shale Products Company*, 121 NLRB 1160 (1958) *Crompton Company, Inc*., 260 NLRB 417 (1982); *Radio Free Europe/Radio Liberty*, 262 NLRB 549, 551 (1982). It is well established that a collective-bargaining agreement meeting these requirements will serve as a bar to an election within the unit covered by that agreement. However, there are certain exceptions to this general rule. One exception is that there is an "open period" from 60 to 90 days prior to the expiration of a contract during which time the existence of the contract will not act as a bar to a petition for an election within the unit covered by the contract. See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962), modifying *Deluxe Metal Furniture Company* 121 NLRB 995 (1958).

Because the 1993-1995 Extension Agreement is not executed by the Union and the Union disputes its validity, it cannot serve as a contract bar to the petition herein. Moreover, assuming that the 1993-1995 Extension Agreement is a valid agreement, by its terms it would have expired on January 31, 1996, and, under its automatic renewal provision, would have renewed itself for a one year period expiring on January 31 of each succeeding year. Thus, by its terms, this agreement it would have expired on January 31, 2003. As the petition herein was filed on November 14, 2002, and the 1993-1995 Extension Agreement would have expired on January 31, 2003, the petition herein would be timely filed within the 60 to 90 day "open period." See *Leonard Wholesale Meats, Inc., supra.* Thus, if it were valid, the 1993-1995 Extension Agreement would not serve to bar the petition filed herein.

Similarly, the 1991-1992 Extension Agreement cannot serve as a contract bar to the instant petition. This agreement expired by its terms on January 31, 1993. Under its automatic renewal provision, it also renewed itself annually for a one-year period expiring on January 31 of each succeeding year. As the petition herein was filed on November 14, 2002, and this agreement would also have expired by its terms on January 31, 2003, the petition herein was timely filed within the 60 to 90 day "open period." See *Leonard Wholesale Meats, Inc., supra*. Thus, the 1991-1992 Extension Agreement does not serve to bar the petition herein.

In view of the foregoing, I find that there is no contract bar to the petition filed herein and I decline to dismiss the petition on that basis.

5/ It is well settled that the unit in a decertification election must be co-extensive with the certified or recognized unit. The only disputed classification is that of the toolpushers. The Employer contends that the toolpushers must be excluded from the unit on the basis that they are statutory supervisors. The Union asserts that there is no agreement executed by both the Employer and the Union in which the

toolpushers have been included in the unit. At the hearing, the Union also took the position that the determination of supervisory status should be made on an individual basis with respect to each toolpusher. As discussed below, I have concluded that the toolpushers are statutory supervisors who are excluded from the unit.

As noted above, the 1993-1995 Extension Agreement purports to add the toolpusher classification to the bargaining unit. The record reflects that since May 1995, the Employer has treated toolpushers as a classification within the bargaining unit and has made health and welfare and pension payments to the Union's trust funds on their behalf. Although the Union disputes the validity of the 1993-1995 Extension Agreement, there is no evidence that the Union has ever objected to the Employer's inclusion of toolpushers as covered under their collective-bargaining agreement, notwithstanding that this classification is not listed in any contract other than the 1993-1995 Extension agreement.

The Employer's Operation. The Employer is engaged in drilling operations for the oil and gas and geothermal industries. Most of its work is performed within the State of California. At the time of the hearing, the Employer employed approximately 90 to 95 employees as well as eight toolpushers. About seven employees, including shop mechanics, welders and yard employees, work at the Employer's Arbuckle facility. The rest of the employees work on oilrigs located within a 100-mile radius of the Arbuckle facility. The Employer bids on drilling jobs and sends out drilling rigs and crews after obtaining contracts. Each job lasts about two weeks. During a job, the drilling rig operates twenty-four hours a day, seven days a week.

Four crews are typically assigned to a drilling rig. Each crew has four employees, a driller, a derrickman, a motorman and a rotary helper (also called a floorman). The driller is responsible for the operation of the rig. The derrickman works in the tower guiding the pipe. The motorman and the floorman work side-by-side on the rig floor making the connections for the pipe coming in and out of the hole being drilled.

One toolpusher is also assigned to each drilling rig. The toolpusher is the individual in highest authority for the Employer at the drill site and he is scheduled to live on site for ten days on, five days off. Another toolpusher provides relief when the toolpusher assigned to a rig is off work. No employee in any other classification substitutes for the toolpusher when he is off duty.

Each crewmember, with the exception of the toolpusher, works an eight-hour shift and goes home each day at the end of his shift. At the time of the hearing, the Employer operated five rigs. All rigs were staffed with one toolpusher and three crews consisting of four persons each.

The Employer's operation is seasonal and it lays off employees (except toolpushers) in the winter months when the weather makes drilling operations prohibitively expensive. The Employer's busy season runs from April or May to November or December and its slow season runs from November or December to April or May. During the busy season, the Employer will typically employ 125 employees and operate six drilling rigs. As indicated above, at the time of the hearing, the Employer was operating only five rigs. One employee, a rotary helper, was on lay off status at the time of the hearing.

Many of the employees hired by the Employer have worked for it previously. Typically, the Employer telephones employees who are on lay off status to recall them to work a few days before a drilling job is to commence.

The record reflects that the Employer has a high employee turnover rate. In 2001, it hired approximately 100 new employees, and in calendar year 2000, it hired approximately 150 new employees.

The Toolpushers. The record reflects that the following toolpushers are typically assigned to operate the Employer's drilling rigs: Rick Wilder (Rig 1); Chris Hauser (Rig 2); Raymond Stroing (Rig 3), William Samuels (Rig 4); John Well (Rig 5); Paul Ayotte (Rig 6). Two toolpushers (John Well and Anthony Granados) serve as relief for the others assigned to the rigs.

The toolpushers report to the drilling superintendent who in turn reports to the Employer's Vice President and General Manager, William Reynolds, Jr. As noted above, the toolpushers are responsible for the operation of their respective drilling rigs and the safety of the crews. The crews report to the toolpusher and bring any problems or other matters needing attention to him, such as the need for equipment repairs, time off requests, and problems with co-workers. The toolpushers monitor the crew and the site and they work with the vendors and the customer's operations representative at the site.

Hiring and Assignment of Work. The drilling superintendent hires the employees and assigns them to the rigs. The toolpushers have no authority to hire employees and there is no evidence that they are involved in the hiring process. The toolpushers have independent authority to switch employees working on their rigs among the different crews and shifts. In order to transfer employees to other rigs, the toolpushers must consult with the drilling superintendent. The Petitioner, Robert Burns, is a driller who has worked for the Employer since 1989. Burns testified that he is aware of situations where a toolpusher has transferred employees to other crews in order to group employees who live in the same geographic area together in order to accommodate commuting needs.

Authority to Promote. The toolpushers have the authority to promote employees on their respective drilling rigs. Such promotions carry with them higher pay rates. Petitioner Burns testified that he had been promoted three times by a

toolpusher: from floorhand to motorman, from motorman to derrickman, and from derrickman to driller.

Time Off and Overtime. The record reflects that the toolpushers have the authority to authorize time off and overtime to employees assigned to their respective drilling rigs. According to Petitioner Burns, he requested and was granted time off by the toolpusher when he got married and when his children were born. Burns testified that sometimes these requests are submitted in advance and sometimes the toolpusher has granted them on the spot. Examples of the latter situation include when Burns had to go to traffic court and when his wife called him because they had no babysitter and he had to get home and take care of the children. The toolpushers also have the authority to authorize overtime pay for employees on their respective crews. This frequently occurs when a toolpusher grants time off to one employee and must replace him with an employee who has worked on another shift. In this regard, Petitioner Burns testified that on several occasions he has been called to work on his days off by the toolpusher and has been paid overtime.

Disciplinary Authority. Toolpushers have the authority to issue written reprimands to employees on their respective crews. These reprimands are placed in the employee's personnel file and are used to support further disciplinary action.

Direction of Work. The record contains no evidence regarding the toolpushers' direction of the daily work of the employees on their respective drilling rigs.

Training. The record reflects that the training is provided on the job with more experienced employees and the toolpusher training those less experienced.

Administrative Tasks. The toolpushers process paperwork, including a report recapping activities for the past 24-hour period, safety reports, rig inspection reports and tower sheets. Tower sheets are employee time records on which employees record their own work time for each shift. The toolpusher reviews the tower sheets, signs them and forwards them to the Employer's office.

Pay and Benefits. Toolpushers are salaried and earn between $5,000 and $6,000 a month. The other employees earn between $15 and $22.50 an hour. All employees and the toolpushers receive the same heath and welfare and pension benefits under the Union contract. All employees and the toolpushers also receive reimbursement for mileage. In addition to the foregoing, toolpushers receive certain benefits that other employees do not receive, including a company car. As noted above, the Employer does not lay off the toolpushers during the slow season as it does other employees. Instead, it reassigns them to work as mechanic assistants at the Employer's facility or assigns them to perform drilling work. At the time of the hearing, one toolpusher was working as a driller.

When the Employer assigns a toolpusher to work in another classification, it continues to pay him at the higher toolpusher salary rate.

Analysis. Section 2(11) of the Act defines the term "supervisor" as:

> "[A]ny individual having authority, in the interest of the Employer-Petitioner, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.,* 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp*., 308 NLRB 555 (1992); *Bowne of Houston, Inc*., 280 NLRB 1222, 1223 (1986). An individual who exercises some "supervisory authority" only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id*. Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp*., 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971*); Waterbed World*, 286 NLRB 425, 426 (1987).

In the instant case, the evidence establishes that the toolpushers are supervisors within the meaning of the Act. Thus, the toolpushers possess and exercise the independent authority to transfer employees on their rigs among crews and shifts, to promote employees, to grant employees time off, to authorize overtime for employees and to issue written reprimands to employees. The reprimands issued by the toolpushers are placed in employee personnel files and can be used to support further disciplinary action.

Secondary indicia also support a finding of the toolpushers' supervisory status. Thus, unlike the employees on their crews who are hourly paid, toolpushers are salaried and are paid more than other employees. They also work a different schedule that other employees, drive company cars and are not laid off during the slow season like the other employees.

Based on the foregoing and my review of all the evidence in the record, I find that toolpushers possess and exercise statutory supervisory authority and they will be excluded from the unit.

Oil Field Truck Drivers. The Independent Oilfield Agreement includes the classification of oil field truck driver. Although the parties stipulated that the Employer has not employed an oil field truck driver for years, I have included this classification in the unit as the Board has held that the unit in a decertification election must be co-extensive with the recognized unit. See *Campbell's Soup Co.*, 111 NLRB 234 (1955).

6/ After carefully considering the positions of the parties regarding the eligibility formula to be used in this case, I have concluded that the formula generally used in the drilling industry as set forth in *Hondo Drilling Company, N.S.L.,* 164 NLRB 416 (1967), should be applied herein. In so doing, I have considered the Employer's contention that employees who have declined offers of employment during the relevant period should be deemed ineligible to vote. I have nevertheless concluded that the *Hondo* formula provides the most reasonable means to determine eligibility and I am applying it herein without modification.

Accordingly, as set forth in *Hondo*, eligible to vote in the election directed herein are those in the unit(s) who were employed for a minimum of ten (10) working days during the 90-day calendar period preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, and who have not been terminated for cause, quit voluntarily prior to the completion of the last job for which they were employed as well as all employees whose names appear on the Employer's payroll list immediately preceding the issuance of the Notice of Election in this proceeding. *Id*.

With regard to whether the election directed herein should be conducted by a mail ballot and if not, the appropriate location(s) for the balloting to take place, these are administrative matters and will be determined after issuance of this Decision in consultation with the parties.

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